BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

M/V AN PING 6, Appellant. v. STATE OF WASHINGTON. DEPARTMENT OF ECOLOGY. Respondent.	PCHB No. 94-118 FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

A final hearing in this matter was held on May 16, 17, and 18, 1995. The board was comprised of Robert V. Jensen and James A. Tupper, Jr., presiding. Court reporting services were provided by Gene Barker & Associates of Olympia, Washington.

Appellant appeared by and through its attorneys Todd A. Zilbert and the law firm of Wood Tatum Sanders & Murphy. Respondent appeared by and through its attorneys Ronald L. LaVigne, Assistant Attorney General.

Having reviewed and considered the sworn testimony and exhibits offered and introduced at the final hearing, the board enters the following

FINDINGS OF FACT

I.

The M/V An Ping 6, owned by Shanghai Hai Shipping, Ltd., appeals the imposition of a $162,000 penalty by the Department of Ecology under RCW 90.56.280 and RCW 90.56.330.

II.

The vessel, a 610 foot grain carrier, sails under the flag of China with a predominately chinese crew. It is not a frequent visitor to U.S. ports. The vessel had been in New Orleans in 1992 and Los Angeles in 1993. Just prior to the spill the vessel had loaded grain in Portland, Oregon. There is no record of prior violations of federal or state clean water laws or oil pollution regulations. The Department of Ecology did offer as exhibits deficiency reports issued by the United States Coast Guard citing a failure to list duties of crew in written oil transfer procedures. This deficiency was first cited during a Coast Guard inspection while the vessel was in Portland on January 8, 1994, and again after the spill on January 10, 1994.

III.

At issue here is an oil spill that occurred on January 10, 1994. The spill was first discovered at around 5:35 a.m. while fuel was being loaded or bunkered on the vessel. The An Ping 6 was at the time anchored in the Columbia River near Longview, Washington. The spill resulted from a fundamental lack of communication between the vessel's chief engineer and the tankerman manning the fuel barge. Significant among the communication problems was a failure to agree on a pumping rate and pumping sequence. The chief engineer believed that fuel was being pumped at twice its actual rate and intended to open and close several tanks as they were filled. There was, however, no radio or other line of communication maintained with the tankerman. When the crew on the vessel first observed that a tank was over-flowing They were

unable to contact the barge to cease pumping while another tank was opened. The unabated pumping led to the discharge of oil over the starboard side of the vessel.

IV.

The first report of the incident was made by the crew of a tug boat lying to the port side of the fuel barge. This report was made around 5:50 a.m. to the tug boat company dispatcher. Thereafter the dispatcher called the Marine Exchange for the Columbia River at 6:13 a.m. and the Washington Department of Emergency Management ("WDEM") at 6:23 a.m. The Marine Exchange, at the request of the vessel agent, placed a second call to WDEM at 6:56 a.m. to insure that the state had been notified of the incident.

V.

The Marine Exchange serves as a communication link for vessel traffic on the river. It also as functions as part of the Marine Fire and Safety Association ("MSFA") to provide initial notification and cleanup mobilization under oil spill response plans. The MSFA is specifically appointed agent by shipping agents to perform the initial response notifications once a response plan has been invoked.

VI.

In this case the vessel agent was notified of the spill by the Marine Exchange at 6:14 a.m. Between that time and 6:30 a.m. an exchange of telephone calls between the shipping agent, the MFSA coordinator, the tug company and contractors resulted in the rapid deployment of cleanup forces. The vessel was boomed off by 6:24 a.m. A skimmer with booming equipment was

dispatched from a site down river by 9:30 a.m. By roughly 8:30 a.m. a cleanup crew and equipment were being assembled in Longview.

VII.

Representatives of the Department of Ecology responded with equal speed. At 6:25 a.m. an Ecology employee contacted the WDEM operator. By 7:00 a.m. Ecology staff were enroute to Longview. By 9:00 a.m. the state had surveyed the spill scene. was preparing for a fly over inspection. and moving rapidly to establish a command post to coordinate the cleanup.

VIII.

This spill involved 800 to 1500 gallons of product based on the assessment done by Don Merritt. The only evidence to contradict this testimony is based on observations of the spill in comparison to other spills observed by various witnesses. Two Ecology witnesses estimated, based on visual observations. that 5,000 to 10.000 gallons were discharged into the river. This testimony is inconsistent with the department's enforcement recommendation wherein Ecology staff estimated approximately 3.000 gallons were discharged "based on their experience and observations." The critical factual dispute is the difference between the oil pumped from the fuel barge in comparison to the fuel loaded into the vessel's tanks and fuel remaining on the vessel deck after the spill. Based on Merritt's opinion that difference is no more than 1500 gallons. A similar assessment was performed by the United States Coast Guard and relied on by the Department of Ecology in evaluating the gravity of the spill. The Coast Guard was unwilling to

make itself available to the parties or the board for clarification on this issue. We therefore find that the Merritt testimony establishes the amount of oil discharged to the river.

IX.

The majority of oil discharged was captured within the area of Fisher Island Slough. The north bank of the slough consists of two marinas. a house boat community and a rip rap buttressed embankment that runs down river to Willow Grove Park at the west end of the slough. Fisher Island makes up the south shore of the slough. The up-river end of island shoreline is predominately grasses and mud. The area across from the house boat community consists of dense willows and other growth. These areas were particularly hard hit by the thick tar like bunker fuel discharged from the vessel.

X.

The rapid and thorough response by the MSFA. vessel agent, state and Coast Guard limited the impact of this spill. There is no indication that any serious threat was posed to the important natural resources within the Columbia River estuary downstream. While there was an evacuation of some residents early in the spill response. the Department of Ecology On-Scene Coordinator concluded that the evacuation of residents was precipitous and that there was no serious threat to human health from the spill. No evidence was presented that indicated any direct adverse impact on fish or wildlife from the spill. The state further concluded that the majority of recoverable oil was removed by January 18. 1994. The only exception and remaining concern after that date was a 1300 foot section of the willow grove on Fisher Island.

The willows were problematic because of dense branches and roots at water level during high tide that made conventional cleanup methods difficult to implement. Of concern throughout the cleanup of the willows was the potential adverse impact of aggressively trying to clear out contaminated branches. The debate and indecision as to how cleanup should have proceeded is understandable. Aggressive cleanup measures had the potential of creating excessive oily debris and only compounding contamination that might otherwise weather and dissipate over time. At the same time there was concern that animals and birds would come into contact with oil on the short stretch of the willows. The willows represent a particularly sensitive environment. During the course of cleanup animal tracks through the oil contamination were noted by state officials. The willows are also in close proximity to several heron rookeries. Herons were anticipated to return to these nesting sites within weeks of the spill. It was crucial therefore that the contamination of the willows be addressed and resolved as quickly as possible.

XI.

The course of the cleanup was directed by three on-scene coordinators (OSC) representing the federal and state governments and the responsible party, in this case the vessel. The Department of Ecology, as lead agency, held ultimate authority for cleanup decisions. The cleanup actions undertaken by the responsible party were done with the agreement and approval of the state OSC. With respect to the willows, the state initially approved passive clean up measures that included raking and removal of debris but no willow cutting. On January 16 the state OSC approved steam cleaning of the willows and recorded in his notes that it "seems to be

working." On the same day the state OSC concluded that Fisher Island would need at least two more days of cleaning. On the evening of January 16 the state OSC approved a different approach. As recorded by the state OSC, the willows were to be "hit hard" at low tide. This would be preceded by booming the beach at high tide and collection of any debris. As the tide dropped, the crews would begin to spray the willows with a water fog. This plan was implemented on January 17. This plan continued to be implemented through January 20 without objection by the state OSC. On January 20 the responsible party OSC asked the state for permission to either stop cleaning or cut the willows back. The state OSC disagreed with cutting because it would create too much debris, be a waste of time and unprofitably divert efforts of the cleanup crews. Work on the willows continued through Saturday January 22, 1994. By agreement, or at least without apparent objection, the cleanup contractors did not work on Sunday January 23, 1994.

XII.

On January 22 the state OSC changed his opinion as to cutting the willows. After consultation with department staff the state OSC concluded that selective cutting of the willows would be appropriate. This was presented to the responsible party OSC informally on the same afternoon. By letter on January 24, 1994, the state OSC outlined the specific additional cleanup measures including cutting that would be required for the willows. The responsible party did not resume work on the willows until January 28, 1994. The responsible party OSC was apparently waiting for approval from the vessel's insurance carriers to proceed with further

efforts in the willows. Cleanup only resumed work when the responsible party OSC was advised by the state OSC that either the work resumed or the state would undertake the work on behalf of the responsible party. The responsible thereafter commenced the additional work outlined in the January 24. 1994. letter and completed that work on February 1, 1994.

XIII.

The funds expended on this cleanup are considerable. Over $1 million in response costs were incurred on behalf of the vessel. The vessel is also subject to additional claims for the costs incurred by the federal government and state government in responding to the spill. The vessel may also be subject to claims for natural resource damages as well as a civil penalty assessed by the Coast Guard.

XIV.

The Department of Ecology issued Notice of Penalty Incurred and Due No. DE 94CP-S244 on June 6. 1994. The notice cites violation of RCW 90.56.280 because the master of the vessel did not notify WDEM of the spill. The notice also cites violation of RCW 90.56.330 for negligent discharge of oil. In assessing a penalty under this section the department asserts in the notice of penalty that the maximum daily penalty is $20.000. In this case the department assessed a daily penalty of $19.000 for eight days. In the notice Ecology states:

> Records show that that the spill posed a risk to the environment for several weeks. particularly due to the difficulty experienced in getting the spiller's representative to follow the suggested methods of cleanup related to the willows on Fisher Island. However. the majority of the recoverable oil was removed by January 18. 1994. Accordingly, the oil is found to have posed a risk to the environment for eight days.

In computing the daily penalty the department relied on its own enforcement guidelines. Using these guidelines Ecology classified the spill as a "Class 1" based on the volume of oil discharged to the water. Also relying on the guidelines the department concluded the minimum daily penalty was $17,500. This amount was increased to $19,000 based on the alleged recalcitrance of the vessel representative to proceed with cleanup of the willows.

XV.

Any conclusion of law deemed to be a finding of fact is hereby adopted as such.

Based on the foregoing findings of fact, the board enters the following

CONCLUSIONS OF LAW

I.

The board has jurisdiction over this matter in accordance with RCW 43.21B.110. This matter was heard de novo by the board.

II.

The initial legal issue presented to the board is the allocation of the burden of proof in this matter as to the reasonableness of the penalty assessed. As a matter of general principle the burden of proof in litigation rests with the party seeking affirmative relief. Gillingham v. Phelps, 11 Wn.2d 492 (1944); State v. Malone, 9 Wn. App. 122 (1973). This rule has also been stated to place the burden of proof on that party "who would be defeated if no evidence at all were

offered." Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1636 (1911). The burden of proof consists of two components. the burden of production or coming forward with evidence. and the ultimate burden of persuasion. Gillingham, 11 Wn.2d at 495. We conclude. consistent with the rules of this board. that the initial burden of proof rests with Ecology. WAC 371-08-1804(a).

III.

The de novo standard. which has been consistently applied to penalty matters by the PCHB. is derived from the concept that a notice of penalty is akin to a summons and thus constitutes only an allegation that a violation occurred and a claim for relief in the form of a penalty. It does not connote any type of adjudication of the claimed violation. Indeed, the Department of Ecology is without authority to conduct any administrative adjudication of its penalty assessments. Protan Laboratories, Inc. v. Department of Ecology, PCHB No. 86-20 (1986). The board's interpretation of its standard of review has been upheld in Yakima Clean Air Authority v. Glascam Builders, 85 Wn. 2d 255. 260 (1975). and in PCHB v. Fields Products, 68 Wn. App. 83. 87 (1992). Consistent with the de novo standard of review this board is not required to afford any deference to the claim or summons issued by the Department of Ecology. Bueschel v. Kitsap County, 125 Wn.2d 196. 202 (1994)(discussing the de novo standard of review for the Shorelines Hearings Board). It is thus improper and in derogation of this board's statutory authority to assign any deference as to the reasonableness of a penalty even where a violation is evident or stipulated. In most cases this issue is of little consequence because the board's decision falls where the preponderance of the evidence lies regardless of the burden of

proof. The evidence on the reasonableness of a penalty is very rarely in a state of equipoise such that a decision will turn on the burden of proof.

IV.

We recognize that the foregoing conclusion is contrary to Fletcher v. Ecology, PCHB No. 94-178, Conclusion of Law III (1995). The relative burden of proof was not, however, an issue raised by either party in Fletcher and the board's comments were rendered without any legal analysis or discussion. Compare, Protan Laboratories, Inc. v. Ecology, PCHB No. 86-20 (1986). Having considered the issue on the briefing of the parties in this case, the board is convinced that it is inappropriate to place the burden of proof as to the reasonableness of a penalty on the appellant.

V.

We turn next to the alleged violation of RCW 90.56.280 which provides:

> It shall be the duty of any person discharging oil or hazardous substances or otherwise causing, permitting, or allowing the same to enter the waters of the state, unless the discharge or entry was expressly authorized by the department prior thereto or authorized by operation of law under 90.48.2000, to immediately notify the coast guard and emergency management division. The notice to the division of emergency management within the department of community development shall be made to the division's 24-hour statewide toll-free number established for reporting emergencies.

The clear intent if this language is to insure prompt notice to the state and the Coast Guard in the event of a spill. The vessel was cited only for failing to notify the WDEM.

There is no dispute that a call was made to WDEM on behalf of the tug boat participating in transfer of oil at 6:23 a.m. We conclude that this call discharged the notification requirements

under the statute. The tug boat was a participant in the oil transfer and at least in part responsible for the failure of communication that resulted in the discharge of oil to the river. As such, the tug was "any person" within the meaning of the statute. The duty to notify the state was also satisfied by the call from the marine exchange to WDEM at 6:56 a.m. Ecology's own enforcement guidelines interpret immediate to mean within one hour of the spill. In this case the spill was first observed between 5:30 and 5:50 a.m. The call at 6:56 a.m. was close enough in time to discovery of the event to satisfy the statutory notification obligation.

VI.

Ecology argues that notice from the Marine Exchange does not satisfy the notification requirement because the exchange is not an agent of the vessel and was never authorized by the master of the vessel to make a call to WDEM on behalf of the vessel. We disagree. As a member of MSFA, the marine exchange is specifically appointed under oil spill response plans to undertake call out notice to regulatory agencies in the event of a spill. In this case an oil spill response plan was invoked at 6:14 a.m. with contact from the marine exchange to the vessel agent. As a consequence of the oil spill response plan having been invoked, the Marine Exchange was authorized to contact WDEM on behalf of the vessel under the terms of the MSFA enrollment agreement. The plan clearly worked as intended. The state and other emergency response agencies were immediately notified of the spill and immediate response action was taken by all parties. It makes little sense in a situation where time is critical to impose a burden on the parties to make multiple calls to WDEM. For vessels enrolled in MSFA, the notification

requirement is best delegated to the Marine Exchange leaving the master of the vessel, the vessel agent and interim responsible party OSC to deal with the more important spill response.

We accordingly find no violation of RCW 90.56.280.

VII.

The remainder of this case is confined to the reasonableness of the $152,000 penalty for negligent discharge of oil under RCW 90.56.330. Summary judgment was previously entered on an noncontested motion finding that the vessel was liable under this statute. As a preliminary matter the Department of Ecology contends that while that statute sets the maximum daily penalty at $20,000, the vessel here is subject to a daily maximum of $30,000. Ecology arrives at this argument under the theory that any violation of RCW 90.56.330 is also a violation of RCW 90.56.320 proscribing the discharge of oil to waters of the state. The daily maximum penalty for violating RCW 90.56.320 is $10,000 pursuant to RCW 90.48.144. This interpretation of the law was upheld in Leson v. State, 72 Wn. App. 558, 565 (1993). Unlike Leson, however, in this case the department did not seek to impose a daily penalty of $30,000. The notice of penalty does not reference RCW 90.56.280 or a daily maximum penalty of $30,000. RCW 90.48.144 requires that any penalty imposed under its terms be done so in accordance with the procedures of RCW 43.21B.300. That statute in turn requires notice of a penalty assessment, an opportunity to request reconsideration by the department, and an opportunity to appeal to the PCHB. The department may not raise a violation of a statute for the first time at the final hearing before the PCHB and comply with these procedural requirements. The maximum daily penalty is thus

$20.000 for "each day the spill poses risks to the environment as determined by the director" as provided in RCW 90.56.330.

VIII.

RCW 90.56.330 provides the following guidelines for establishing the amount of a penalty:

> The amount of the penalty shall be determined by the director after taking into consideration the gravity of the violation, the previous record of the violator in complying, or failing to comply, with the provisions of chapter 90.48. RCW, the speed and thoroughness of the collection and removal of the oil, and such other matters as the director deems appropriate.

Ecology presented no evidence regarding a past history of violations of 90.48 RCW. The only violations introduced were deficiency notices issued by the Coast Guard just before and after the spill. These deficiencies notices, related to the negligence causing the spill, should not be factored into the amount of the penalty in terms of compliance history. It also appears the vessel responded thoroughly and effectively to the oil spill with the exception of the delay between January 24 and January 28 in undertaking the final response actions at the willow grove. The penalty should accordingly be based on the failure of the vessel to promptly undertake the final cleanup actions on the willows, the gravity of the spill and the number of days the spill posed a risk to the environment.

IX.

One gauge of the gravity of this spill is the volume of oil discharged. Ecology estimated that the amount was in excess of 2,700 gallons in the notice of penalty and considered the spill at the high range of spill classification under its penalty guidelines. We have concluded that the volume of oil discharged was less that 2.000 gallons. The gravity of the spill can also be assessed on the threat it posed to the Columbia River estuary and in particular the area known as the willows on Fisher Island. Even at 2000 gallons the spill could have done significant damage to the estuary and did in fact constitute a prolonged threat to wildlife on Fisher Island.

X.

While the board is not bound by the Ecology penalty guidelines, those guidelines do provide a useful reference point for assessing the reasonableness of a penalty and insure a fair and consistent application of the law. While the volume of oil discharged would suggest that spill be treated as a Class 2 event, treating the matter as a Class 1 spill is not unreasonable given the sensitivity of the environment. The guidelines for a Class 1 spill suggest a daily penalty of between $17,500 and $20.000 under RCW 90.56.330.

We conclude that a daily penalty of $19.000 is reasonable. This amount takes into account the volume of oil discharged as found by the board and the sensitivity of the Columbia to any discharge of oil and the potential that this spill could have caused considerable damage to important regional resources. Finally, this amount reflects the delay by the vessel in implementing the final cleanup measures required for the willows on January 24, 1994. We are

not sympathetic to the view by the department expressed at the hearing that the responsible party was recalcitrant to implement a cleanup effort endorsed by the state from the outset. The notes of the state OSC coordinator, minutes of meetings by the parties during the response action and testimony of the witnesses make clear that the state did not require any cutting of the willows prior to January 22, 1994. At the same time we are concerned that the vessel abandoned cleanup for several days to confer with its insurance carriers. Regardless of what may have occurred prior to January 22, there is no excuse for any delay in implementing the cleanup described orally on January 22, 1994, and in writing on January 24, 1994.

XI.

Our remaining consideration is the number of days the spill posed a risk to the environment. As originally determined by the department in the notice of penalty the threat to the environment was substantially abated by January 18, 1994; the date by which the majority of recoverable oil had been removed. As elicited in testimony this date is conservative. It fully appears that any recoverable oil was removed prior to that date and that any remaining oil was limited to contamination on shorelines, facilities and boats within Fisher Island slough. By the morning of January 19, 1994, for example, little or no oil was being released from the area of the willows. The state OSC noted on that date only the presence of an oily sheen being discharged from the willows. Any risk posed by the willows was thus in the loss of habitat and potential that wildlife might have come into contact with the oil saturated area prior to the final cleanup effort undertaken on January 28, 1994.

XII.

The daily penalty amount of $19,000 should accordingly be assessed for a period of eight days from January 10, 1994, through January 18, 1994, for a total penalty of $152,000.

XIII.

Any finding of fact deemed to be conclusion of law is hereby adopted as such.

From the foregoing findings of fact and conclusions of law the board enters the following

ORDER

IT IS HEREBY ORDERED that Notice of Penalty Incurred and Due No. DE 94CP-S244 is REVERSED as to the violation and penalty in the amount of $8,000 imposed under RCW 90.56.280; and

IT IS FURTHER ORDERED that the same notice of penalty is AFFIRMED as to the violation of RCW 90.56.330 and penalty in the amount of $152,000.

DONE this 10th day of August, 1995.

POLLUTION CONTROL HEARINGS BOARD

JAMES A. TUPPER, JR., Presiding

ROBERT V. JENSEN, Member

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